Filed 8/19/04 P. v. James CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DARREN DEMETRIUS JAMES,

Defendant and Appellant.

F044192

(Super. Ct. No. 1053632)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. Loretta Murphy Begen, Judge.

Anthony L. Dicce, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and Michelle L. West, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Harris, Acting P.J., Buckley, J. and Gomes, J.

STATEMENT OF THE CASE

On May 19, 2003, an information was filed in the Superior Court of Stanislaus County which charged appellant Darren Demetrius James with count I, sale of cocaine (Health & Saf. Code, § 11352, subd. (a)),[1] with the special allegation that he suffered a prior conviction within the meaning of section 11370.2. Appellant pleaded not guilty.

On July 7, 2003, the court bifurcated the special allegation and appellant's jury trial began. On July 9, 2003, the court declared a mistrial after the jury was unable to reach a verdict.

On August 18, 2003, appellant's second jury trial began. On August 19, 2003, appellant was convicted. On August 20, 2003, the court found the special allegation true.

On September 17, 2003, the court denied probation and sentenced appellant to the midterm of four years, with an additional three-year term for the special allegation, for an aggregate term of seven years.

On October 27, 2003, appellant filed a timely notice of appeal.[2]

FACTS

In December 2002, James Davidson was employed by the Modesto Police Department as a citizen narcotics informant. The police department provided him with an apartment and paid him living expenses of $150 per month. He was also paid $25 for each controlled purchase.

On the afternoon of December 5, 2002, Sergeant Craig Gundlach asked Davidson if he could purchase cocaine base from appellant, who was also known as "Bookie."

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[1]All statutory references are to the Health and Safety Code unless otherwise indicated.

[2]The notice of appeal was not included in the clerk's transcript, and appellant sought to correct the record. A copy of the notice was filed with this court on January 27, 2004, along with a declaration from the Stanislaus County Clerk's Office to correct the appellate record.

Davidson believed he could. Davidson met Sergeant Gundlach and other officers at a shopping center on McHenry Avenue. Davidson called appellant, asked about making a purchase, and arranged to meet him there. Sergeant Gundlach gave two $20 bills to Davidson for the transaction, and wrote down the serial numbers. Davidson went to the prearranged location—in front of the Barnes and Noble bookstore—and waited for appellant, while Sergeant Gundlach watched from the other side of the parking lot. Davidson was equipped with an audio-recording device, and another officer videotaped the transaction.

Appellant arrived in his vehicle and pulled up to the curb. Davidson leaned into the front passenger window and they had a brief conversation. Davidson placed the two $20 bills on the front passenger seat. Appellant produced two "rocks" in a bindle, and placed it on the car seat. Davidson picked up the bindle and appellant drove away.

Davidson immediately delivered the rocks to Sergeant Gundlach. The two rocks consisted of .67 grams of cocaine base, which was enough for approximately 20 doses.

The police followed appellant as he drove away. Appellant stopped at a gas station, used one $20 bill to purchase gasoline, and obtained change for the second $20 bill. The police detained appellant as he left the gas station. Appellant did not have any weapons, drugs, pagers, packaging materials, or narcotics paraphernalia.

On appeal, appellant contends the trial court should have granted his pretrial motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to discharge the public defender. He also asserts the trial court erroneously believed he was subject to a mandatory enhancement pursuant to section 11370.2, and it was unaware that it had discretion to dismiss the enhancement.

DISCUSSION

I.

DENIAL OF THE *MARSDEN* MOTION

Appellant contends the trial court improperly denied his *Marsden* motion and failed to consider his complaints about appointed counsel. Respondent contends the court properly conducted the *Marsden* hearing and denied the motion, and there was no conflict between appellant and the public defender.

A. Background

On February 10, 2003, the complaint was filed. Appellant pleaded not guilty and denied the special allegation, and the public defender's office was appointed to represent him.

On April 22, 2003, the preliminary hearing was scheduled but appellant requested a *Marsden* hearing. Appellant stated his public defender, Ms. Parke, wasn't looking into his case, he did nothing wrong, and he didn't use drugs. Appellant insisted he didn't sell any drugs but Ms. Parke wanted him to accept a plea bargain. Appellant said he filed a motion to obtain "the tapes and stuff" but "they talked about whatever she said. They was gonna do that. They kept switching the times. One day it's a lady, next day it's a man, you know what I'm saying? They ain't, you know what I'm saying, taking time looking into it."

The court explained appellant had two other cases for his probation violations, which were joined with the instant case, and the records showed that Ms. Parke appeared twice and Ms. McBride appeared once. Appellant said a man also represented him, and Ms. Parke confirmed that Mr. Canty made an appearance.

Ms. Parke stated she appeared for appellant earlier that month, but the hearing was continued "for him to hire private counsel at that time." Ms. Parke asked appellant if he still wanted to hire private counsel, and appellant replied he wanted the court to appoint Ernie Spokes to represent him. Ms. Parke explained to appellant that he could not ask the

court to appoint a specific lawyer. Ms. McBride of the public defender's office already filed a discovery motion for the tapes, and a copy was sent to appellant. Ms. Parke informed appellant about the prosecutor's four-year offer but he rejected it. Appellant also told Ms. Parke that "he had some information on a piece of paper concerning the weight" of the drugs from the Department of Justice (DOJ), and the weights were different. Ms. Parke told appellant the police weighed the drugs in the package, the DOJ weighed the drugs without the package, and that accounted for the different weights. Ms. Parke stated her office could adequately represent appellant.

The court did not find any reason to support appellant's request to discharge the public defender's office and appoint another attorney. The court asked appellant if he was interested in the plea bargain, and he said no. The court explained:

> "… Ms. Parke is absolutely correct you don't get to select which attorneys get appointed. The Court goes in order by Public Defender's office, then conflict attorneys, and then appoints an attorney who is next in line. Just so you're clear on that, if I were to have found some sort of a conflict in this matter, I would not be appointing Mr. Spokes in any event."

Appellant replied that he just wanted someone to take the time to look into the case instead of "just coming to me with some deals." The court explained Ms. Parke "has been doing this a long time, and Ms. Parke is certainly willing and always has been to do what it takes to properly defend a case, and I don't think for a moment she would not do that in this particular case or try to encourage you to accept an offer that's improper." Appellant asked why she kept telling him about the plea offers. The court explained she was only advising him about the prosecution's offer.

The court denied the *Marsden* motion:

> "… I don't see anything about—or heard anything here this morning to support any kind of a motion to have the Public Defender's office relieved, so that request then will be denied, and the Public Defender's office will still remain your attorney."

Appellant did not raise any further *Marsden* motions during the rest of the criminal proceedings.

On May 5, 2003, appellant's preliminary hearing was conducted, and appellant was represented by Deputy Public Defender Daniel Johnson. Sergeant Gundlach was the only witness, and Mr. Johnson extensively cross-examined him about his observations of the controlled purchase. Appellant was held to answer. Mr. Johnson also represented appellant at both jury trials, the first of which ended in a mistrial.

B. Analysis

Appellant contends the court improperly denied his *Marsden* motion because Ms. Parke never specifically contradicted appellant's assertions about her failure to investigate and defend the case. Appellant's "inarticulate exposition begged for clarification and answers. Yet the lower court here ignored its many leads."

"'"'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." [Citations.]' [Citation.] '[S]ubstitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel.'" (*People v. Hart* (1999) 20 Cal.4th 546, 603.) The court may not deny substitution of counsel based solely on its own courtroom observations of the attorney's prior demonstrations of courtroom skill without permitting the defendant to relate alleged instances of incompetence. Rather, the court must make an inquiry in open court in the presence of the defendant. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1091;

People v. Hill (1983) 148 Cal.App.3d 744, 753-755; *Marsden, supra,* 2 Cal.3d at pp. 123-124.)

Where the trial court makes factual findings in evaluating a *Marsden* motion, those findings are entitled to deference and we review them under the substantial evidence standard. "… To the extent there was a credibility question between defendant and counsel at the hearing, the court was 'entitled to accept counsel's explanation.' [Citation]." (*People v. Smith* (1993) 6 Cal.4th 684, 696.) "[T]he inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*. But the decision must always be based on what has happened in the *past*. The further one is in the process, the more counsel has done in the past that can be challenged, but that is a difference of degree, not kind." (*Id*. at p. 695, italics in original.)

At the *Marsden* hearing, the trial court asked appellant to explain, in his own words, the problem between him and his attorney, and why he believed his attorney's representation was inadequate. Appellant complained the public defender was not looking into his case, he couldn't obtain the tape recordings of the controlled purchase, there were reports with different weights for the drugs, the public defender wanted him to take a plea bargain, and different attorneys appeared at different hearings. Ms. Parke stated her office already made a discovery motion for the tapes, explained the reason for the two different weights of the cocaine, stated that she merely informed appellant of the prosecution's plea offer, clarified that other public defenders appeared at status hearings, and that her office could adequately represent appellant. She also explained that appellant wanted a particular attorney to represent him, but she advised appellant that the court could not appoint a specific attorney. The court similarly advised appellant that even if it relieved the public defender's office, he would still not be entitled to appointment of a particular attorney.

The trial court herein gave appellant and counsel ample opportunity to be heard on the *Marsden* motion, and there is simply no evidence on this record that counsel was not providing adequate representation or there was an irreconcilable conflict between appellant and the public defender. Appellant insists that Ms. Parke "never specifically contradicted [his] assertions regarding what, if anything, she did on appellant's behalf." Appellant complains that his "inarticulate exposition begged for clarification and answers," and the trial court should have required Ms. Parke to explain her investigation and preparation, and whether she had consulted with appellant. Appellant's complaints, however, were quite specific as to his belief that Ms. Parke wanted him to accept the plea bargain, no one had obtained the tape recordings, and no one had looked into the discrepancies with the weight of the drugs, and Ms. Parke responded to each point. Ms. Parke correctly understood her "duty in the plea negotiation process to present and evaluate all plea offers." (*People v. Smith, supra*, 6 Cal.4th at p. 696.) In addition, "the number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence" for purposes of *Marsden*. (*People v. Silva* (1988) 45 Cal.3d 604, 622; *People v. Hart, supra,* 20 Cal.4th at p. 604.)

Appellant asserts the record "does not exclude the possibility" there was "some legitimate complaint" which would have been disclosed if the court had made further inquiries. Appellant's claim is specious in light of the record. The court's inquires were more than adequate. It repeatedly asked appellant if he had any other complaints and responded to some of his procedural questions. Although appellant indicated his frustration with the public defender, the record reflects Ms. Parke and the public defender's office were adequately representing appellant. There is no evidence that defense counsel was incompetent, or that appellant and counsel had become embroiled in such an irreconcilable conflict that ineffective assistance was likely to result. We therefore find no basis for concluding that the trial court either failed to conduct a proper

Marsden inquiry or abused its discretion in declining to substitute counsel. (See, e.g., *People v. Hart, supra,* 20 Cal.4th at pp. 603-604.)

II.

IMPOSITION OF THE ENHANCEMENT

Appellant next contends the trial court erroneously believed it had to impose a three-year term for the section 11370.2 enhancement, and it didn't realize it had discretion to dismiss the enhancement pursuant to Penal Code section 1385. Respondent asserts the court was aware of its discretion, and it was not inclined to dismiss the enhancement.

A. Background

The court found true the special allegation that appellant was convicted on December 17, 1999, of the sale of cocaine base in violation of section 11352, subdivision (a), within the meaning of the section 11370.2 enhancement.

The prosecutor submitted a sentencing statement, which asserted appellant was not eligible for probation based on his prior narcotics conviction unless there were unusual circumstances. Such circumstances were not present and he was not a suitable candidate for probation, given appellant's record of committing a similar offense, the current offense was as serious as the prior offense, there were no facts limiting appellant's culpability, he was not a passive participant, the crime demonstrated criminal sophistication, and his prior performance on probation was not satisfactory. The prosecutor argued he should receive the midterm of four years for the substantive offense and three years for the special allegation.

The probation report contained appellant's juvenile and adult record. As a juvenile, he was placed on probation in August 1996 for theft (Pen. Code, § 484, subd. (a)). In November 1996, he was again placed on juvenile probation for receiving stolen property (Pen. Code, § 496, subd. (a)). In December 1998, he violated probation by failing to report. In June 1999, he again violated probation by failing to report.

As an adult, in March 2000 he was convicted of two counts of the sale of a controlled substance (§ 11352, subd. (a)), and placed on three years probation on condition of serving 120 days in jail. In October 2000, he was convicted of felony possession of a controlled substance (§ 11350), a misdemeanor violation of failing to stop after causing property damage (Veh. Code, § 20002, subd. (a)), and placed on three year's probation.

The probation report found two circumstances in aggravation: appellant was on probation when he committed the offense, and his prior performance on probation was unsatisfactory. There were no mitigating circumstances. The report stated the range of terms for the substantive offense and the special allegation as "(3, 4, or 5 years) + 3 years."

At the sentencing hearing, the prosecutor argued appellant should be sentenced to a total term of seven years in state prison, the aggravating circumstances outweighed any mitigating circumstances, and he already had a prior conviction for the identical offense of selling cocaine. The prosecutor also requested the court to terminate probation in appellant's unrelated misdemeanor case. Defense counsel replied that appellant had previously been placed on probation, he didn't have a long record, this would be his first prison commitment, and the offense involved a small amount of cocaine.

The court found appellant was not eligible for probation and there were no unusual circumstances based on appellant's lengthy record, and that his prior conviction for the sale of cocaine was close in time to the instant case. The court imposed the midterm of four years for the sale of cocaine, and turned to the special allegation:

> "Pursuant to Health and Safety Code Section 11370.2 for the prior drug sales conviction which was found to be true in your case, *I must sentence you to an additional three years* in state prison to run consecutive to your term of state imprisonment in Count I, for a total of seven years." (Italics added.)

The court calculated appellant's credits and clarified the amount of restitution which he still owed in his previous cases. The court asked if he had any questions:

> "[APPELLANT]: Yes. Did you give me seven years or four years?
>
> "THE COURT: Well, you had four years, which is the midterm, and you received three years because you had a prior conviction for drug sales and *I'm required by state law to add three years to your sentence because of that prior conviction*, so you have a total of seven years in state prison, but you are eligible for half-time on that sentence." (Italics added.)

B. <u>Analysis</u>

Appellant relies on the trial court's statements at the sentencing hearing, as italicized *ante*, and argues the court mistakenly believed the three-year term for the section 11370.2 enhancement was mandatory, and didn't realize it had discretion to dismiss the enhancement pursuant to Penal Code section 1385.

Section 11370.2 was enacted in 1985 with the express purpose of punishing "'more severely those persons who are in the regular business of trafficking in, or production of, narcotics ….'" (*People v. Garcia* (1989) 211 Cal.App.3d 1096, 1100-1101.) "Looking at the stated legislative purpose in enacting section 11370.2, we perceive the Legislature intended, and continues to intend, to more severely punish those who have suffered prior convictions for sale of drugs because those persons are more likely to be in the regular business of trafficking, having dealings, in drugs." (*Id*. at p. 1101.) As applicable in the instant case, section 11370.2, subdivision (a) imposes a full, separate, and consecutive three-year enhancement on those convicted of certain controlled substance or cocaine base offenses, based on a prior felony conviction for violating section 11352, whether or not the prior conviction resulted in a term of imprisonment.

Until 1998, Penal Code section 1170.1, subdivision (h) provided that the trial court could strike the additional punishment for several enhancements, including section 11370.2, "'if it determines that there are circumstances in mitigation of the additional

punishment and states on the record its reasons for striking the additional punishment.' [Citation.]" (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155-1156.)

> "The Legislature repealed this subdivision of the Penal Code effective January 1, 1998, stating at the time: 'In repealing subdivision (h) of Section 1170.1, which permitted the court to strike the punishment for certain listed enhancements, it is not the intent of the Legislature to alter the existing authority and discretion of the court to strike those enhancements or to strike the additional punishment for those enhancements pursuant to Section 1385, except insofar as that authority is limited by other provisions of the law.' [Citation.]" (*People v. Meloney, supra*, 30 Cal.4th at p. 1156.)

Based on this legislative history, the trial court still retains discretion to dismiss a section 11370.2 enhancement pursuant to Penal Code section 1385. (See, e.g., *People v. Meloney, supra*, 30 Cal.4th at p. 1156; *People v. Bradley* (1998) 64 Cal.App.4th 386, 391, fn. 2.)

A defendant serving a sentence imposed by a court that misunderstood the scope of its discretion to strike prior felony conviction allegations or findings pursuant to Penal Code section 1385, subdivision (a), may raise the issue on appeal. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13; *People v. Metcalf* (1996) 47 Cal.App.4th 248, 251-252.) However, the record must affirmatively demonstrate that the court misunderstood the scope of its discretion. (See, e.g., *People v. Fuhrman* (1997) 16 Cal.4th 930, 945-946.)

While neither the court nor the parties herein discussed Penal Code section 1385, the court's statements at the sentencing hearing strongly indicate it believed the section 11370.2 enhancement was mandatory and it did not retain discretion to dismiss the enhancement: "I must sentence you to an additional three years" and "I'm required by state law to add three years to your sentence because of that prior conviction."

It could be argued that there is no evidence the court would have exercised its discretion to dismiss the enhancement if it had been aware of such discretion. However, the court only imposed the midterm for the substantive offense and did not make any

comments to indicate that it would not have been inclined to dismiss the enhancement. Thus, it cannot be said that a more favorable outcome is not reasonably probable given the entirety of the record. Under these circumstances, it is appropriate to remand the matter to the trial court "to permit it to resentence defendant with an accurate view of its powers' [Citation.]" (*People v. Metcalf, supra*, 47 Cal.App.4th at p. 251; see also *People v. Bradley, supra,* 64 Cal.App.4th at p. 400.)

DISPOSTION

The judgment of conviction is affirmed. The matter is remanded for resentencing for the trial court to decide whether to exercise its discretion under Penal Code section 1385 with regard to the Health and Safety Code section 11370.2 enhancement.